

<sup>1</sup> 5 U.S.C. §§ 8101-8193.

## **FACTUAL HISTORY**

OWCP accepted that on May 10, 1985 appellant, then a 35-year-old mechanic, sustained a torn ligament of his left knee. It was later accepted that he sustained a single episode of major depression as a consequence of the May 10, 1985 injury.

In a March 24, 2011 decision, OWCP determined that appellant forfeited all wage-loss compensation received between March 1, 1992 and June 15, 2006 due to his failure to report his self-employment and earnings on various CA-1032 forms covering this period. It found that he worked as a general contractor in a remodeling business which he owned with his wife, but that he failed to report his employment activities and earnings on these forms.

In an April 20, 2011 letter, OWCP advised appellant of its preliminary determination that he had received a \$429,961.37 overpayment of compensation for the period March 1, 1992 to June 15, 2006. It indicated that the overpayment was based on the forfeiture of compensation received between March 1, 1992 and June 15, 2006 and it made a preliminary determination that he was at fault in the creation of the overpayment.

Appellant requested a prerecoupment hearing with an OWCP hearing representative. In an August 4, 2011 decision, the hearing representative “set aside” OWCP’s April 20, 2011 preliminary determination and indicated that the case was remanded to OWCP to further consider whether the evidence showed that his compensation should be forfeited for the entire period he received compensation between March 1, 1992 and June 15, 2006.<sup>2</sup> Although she suggested that she was only addressing the overpayment of compensation matter, her decision directly impacted the underlying basis for the preliminary overpayment determination, *i.e.*, the forfeiture of compensation. Therefore, the hearing representative effectively set aside OWCP’s March 24, 2011 forfeiture decision and remanded the case to OWCP for further development of the forfeiture and overpayment matters.<sup>3</sup>

In a December 2, 2011 letter, OWCP advised appellant of its preliminary determination that he had received a \$382,003.58 overpayment of compensation for the periods March 1, 1992 to July 19, 1995, May 16, 1996 to July 16, 1997 and May 1, 1998 to June 15, 2006.<sup>4</sup>

Appellant requested a prerecoupment hearing with an OWCP hearing representative. At the April 20, 2012 hearing, he testified that his contribution to the remodeling business was minimal.

---

<sup>2</sup> OWCP’s April 20, 2011 letter did not constitute a final decision on the overpayment matter, but rather was a preliminary overpayment determination.

<sup>3</sup> In her August 1, 2011 decision, OWCP’s hearing representative directed that, once all necessary development was completed, a new decision should be issued.

<sup>4</sup> OWCP stated, “This overpayment decision is a recalculation of the overpayment decision dated April 20, 2011. That decision was remanded by the hearing representative to exclude the period in which [OWCP] could not locate the [CA-1032 forms] for the period of 1996 and 1998.” In her August 4, 2011 decision, OWCP’s hearing representative did not, in fact, direct OWCP to exclude any given period from the overpayment, but rather effectively directed OWCP to further develop the forfeiture and overpayment matters and issue an appropriate decision.

In a June 12, 2012 decision, OWCP's hearing representative found that appellant received a \$382,003.56 overpayment of compensation and that he was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. He indicated that appellant was not considering the matter of forfeiture stating, "In the present case, the issue is not whether the claimant has forfeited compensation, but whether he is at fault in the matter of the overpayment."

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.<sup>5</sup> Section 8129(a) of FECA provides, in pertinent part, "When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled."<sup>6</sup> Section 8116(a) of FECA provides that while an employee is receiving compensation or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.<sup>7</sup>

Section 8106(b) of FECA<sup>8</sup> provides in pertinent part:

"The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies.... An employee who --

(1) fails to make an affidavit or report when required; or

(2) knowingly omits or understates any part of his earnings; forfeits his right to compensation with respect to any period for which the affidavit or report was required. Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under section 8129 of this title, unless recovery is waived under that section."

An employee can only be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) if he or she "knowingly" omitted or understated earnings. It is not enough to merely establish that there were unreported earnings. OWCP procedure manual recognizes that forfeiture is a penalty<sup>9</sup>

---

<sup>5</sup> 5 U.S.C. § 8102(a).

<sup>6</sup> *Id.* at § 8129(a).

<sup>7</sup> *Id.* at § 8116(a).

<sup>8</sup> *Id.* at § 8106(b).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Forfeiture*, Chapter 2.1402.8 (May 2012).

and, as a penalty provision, it must be narrowly construed.<sup>10</sup> In OWCP's regulations, "knowingly" is defined as: "with knowledge, consciously, willfully or intentionally."<sup>11</sup>

In determining whether a claimant has discharged his burden of proof and is entitled to compensation benefits, OWCP is required by statute and regulations to make findings of fact.<sup>12</sup> OWCP procedure further specifies that a final decision of OWCP must include findings of fact and provide clear reasoning which allows the claimant to "understand the precise defect of the claim and the kind of evidence which would tend to overcome it."<sup>13</sup> These requirements are supported by Board precedent.<sup>14</sup>

### ANALYSIS

In a June 12, 2012 decision, OWCP's hearing representative found that appellant received a \$382,003.56 overpayment of compensation and that he was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. It appears that OWCP's finding that he received an overpayment of compensation was based on a determination that appellant had forfeited compensation for various periods due to failure to report employment activities and earnings. However, the hearing representative explicitly indicated that she was not addressing the matter of forfeiture in her decision.

In an August 4, 2011 decision, a prior OWCP hearing representative effectively set aside a March 24, 2011 decision in which OWCP addressed the forfeiture matter and remanded the case to OWCP for further development of the forfeiture and overpayment matters. The June 12, 2012 decision of the hearing representative, the decision currently being appealed, does not contain detailed facts and findings regarding the forfeiture matter. In the absence of such facts and findings, it is premature to consider whether OWCP properly found an overpayment of compensation and whether appellant was at fault in the creation of such an overpayment because the presumed basis for this overpayment (*i.e.*, the forfeiture of compensation for various periods) has not been adequately addressed by OWCP.

For these reasons, appellant would not understand the precise defects of his claim and further development is needed regarding the forfeiture and overpayment matters to include the provision of adequate facts and findings.<sup>15</sup> The case is remanded to OWCP for further development of the forfeiture and overpayment matters in this case and the issuance of an appropriate decision.

---

<sup>10</sup> See *Christine P. Burgess*, 43 ECAB 449, 458 (1992).

<sup>11</sup> 20 C.F.R. § 10.5(n); see *Anthony A. Nobile*, 44 ECAB 268, 271-73 (1992).

<sup>12</sup> 5 U.S.C. § 8124(a) provides that OWCP "shall determine and make a finding of facts and make an award for or against payment of compensation." 20 C.F.R. § 10.126 provides in pertinent part that the final decision of OWCP "shall contain findings of fact and a statement of reasons."

<sup>13</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4 (March 1997).

<sup>14</sup> See *James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

<sup>15</sup> See *supra* notes 12 through 14.

### **CONCLUSION**

The Board finds that the case is not in posture for decision regarding whether appellant received a \$382,003.56 overpayment of compensation and whether he was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. The case is remanded to OWCP for further development.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the June 12, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: May 7, 2013  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board